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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
and
LOCAL 150-T SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO),
Intervenor,
v.
BAPTIST HOSPITAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT
Baptist Hospital, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 576 F. 2d 107 and reproduced at Pet. App. 1a-12a. The decision and order of the National Labor Relations Board

is reported at 223 NLRB 344 and reproduced at Pet. App. 15a-93a.[1]

JURISDICTION

The order of the Court of Appeals was entered on May 10, 1978 (Pet. App. 13a-14a). The petition for writ of certiorari was filed by the Board on August 8, 1978 and granted on January 8, 1979 (A. 116). The motion to intervene was filed by the Union on January 12, 1979 and granted on March 5, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in concluding on the basis of the record before it that substantial evidence failed to support the Board's finding that the Hospital's no-solicitation rule prohibiting employees from soliciting other employees for any purpose during non-work time in areas of the Hospital which are accessible to patients and their visitors Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

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[1] "Pet. App." refers to the Appendix to the Petition for Certiorari in this case. Reference to the Record appearing in the Appendix to this Court are designated as "A" followed by the page number of the portion of the Appendix specifically referred to in this Brief. For convenience, the Petitioner, National Labor Relations Board, is hereinafter referred to as the "Board"; the Intervenor, Local 150-T, Service Employees International Union, AFL-CIO (the charging party in the unfair labor practice proceedings upon which the Board's order is based) is hereinafter referred to as the "Union"; and the Respondent, Baptist Hospital, Inc., is hereinafter referred to as the "Hospital". The National Labor Relations Act, as amended, 29 U.S.C. §141, *et seq.*, is hereinafter referred to as the "Act". References to the Board's Brief to this Court are designated as "B" followed by the page number of the portion of the Board's Brief referred to in this Brief.

STATUTE INVOLVED

The revelant provisions of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 88 Stat. 395 (29 U.S.C. § 141 *et seq.*) are:

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

STATEMENT

The Non-Solicitation, No Distribution Rule

The Hospital is a non-profit corporation located in Nashville, Tennessee, where it provides health care facilities and services to the public. It regularly employs between 1800-1900 employees and has a 600-bed patient capacity (Pet. App. 2a, 30a; A. 24; B 3). Consistent with its special responsibility as a medical institution, the Hospital has followed a long-standing practice of emphasizing the importance of "patient care" responsibilities to its employees. At least since 1970, it has been the policy of the Hospital to publish an "Employee Handbook" and to require employees to familiarize themselves with its sum-

mary of the Hospital's personnel policies (A. 7)[2] The Handbook is replete with references to the paramount importance of employee patient care responsibilities. The following are typical of such statements:

> "We exist solely to provide superior medical care to all those needing our services." (A. 83)
>
> "Even casual conversations with other employees may be overheard and thereby violate the right of privacy of others. Be particularly careful about your conversation in elevators, eating places and other places of public assembly within the hospital." (A. 98-99)
>
> "As a hospital employee at Baptist you have high standards to maintain. You are urged, therefore, to refrain from loud talking and laughing, gossiping, needless complaining and any other activity that would be disturbing to the patient or out of place in a hospital." (A. 99)
>
> "Noise deters patient treatment and recovery. It is each employee's obligation to avoid unnecessary noise in the hospital. Speak in a quiet, pleasant tone . . . Employees should be alert for sources of unnecessary noise and to report this promptly to their supervisor." (A. 100)
>
> "Employees are asked to remember that visitors to the hospital are frequently upset and unfamiliar with hospital regulations." (A. 103)

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[2] The Handbook was distributed to all employees following its reprinting in August, 1973, and has been furnished to all persons hired by the Hospital since that date as a part of their orientation program. A blue card captioned "Employee Statement" is included in each Handbook containing the following language:

> "The following statement must be signed by the employee and be on file in the Personnel Department before the first pay check will be issued.
>
> "I have read carefully the Employee Handbook of Nashville Baptist Hospital and I understand that I am governed by it. . . ." (A. 114).

Also included in this Handbook is a no-solicitation rule demonstrating similar concern for patient care:

> "Solicitors—In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval from Administration. Violation of this policy will subject employee (sic) to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor." (A. 102)

In addition to the rule prohibiting *anyone* from soliciting *patients* or *visitors* while on Hospital premises, the Hospital also had a long-standing past practice prohibiting *employees* from engaging in any type of solicitation of *other employees* in those areas of the Hospital accessible to the public. Witnesses presented by the Hospital and the Board's General Counsel, including the alleged discriminatee Clyde Russell French, uniformly acknowledged this past practice (A. 21, 24, 69, 70-71). General Counsel's witness Jessie Lee White described two separate incidents in which she had observed Hospital officials enforcing this policy by halting solicitation of employees in the Hospital cafeteria (A. 70-71).[3] While this rule was designed "primarily to keep salesmen out of the Hospital" (A. 30), the rule, as applied and as explained in orientation sessions, also proscribed employee solicitation during work time or in such areas as the public cafeteria.

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[3] The two incidents described involved an Avon saleswoman and car saleswoman attempting to solicit employees in the Hospital's main cafeteria. It is clear from the record that the soliciting Avon saleswoman was also an *employee* of the Hospital (A. 70). This testimony directly refutes the finding of the Administration Law Judge that the Hospital's no-solicitation rule, which had existed prior to the advent of the Union, applied only to outside "*salesmen*" and not to "*employees*" of the Hospital (ALJ Decision, Pet. App. 72a-73a).

Anticipating pending changes to the National Labor Relations Act,[4] the Hospital retained legal counsel "several months" prior to August 25, 1974, when the revisions went into effect. The purpose of this action was to obtain review of *all* of the Hospital personnel policies and procedures to insure their compliance with the Act (A. 21-22). It is emphasized that review of such policies including the Hospital's no-solicitation rule commenced "several months" before August 25, 1974. The record shows that the Hospital's management did not become aware of the Union's organizational campaign until the middle of August, 1974 (A. 3-4.)[5]

Hospital management officials advised its legal counsel that the Hospital had consistently enforced a long-standing rule which prohibited all forms of solicitation by employees in those areas of the Hospital accessible to the public. Counsel was further advised that the Hospital had permitted employees to engage in solicitation in various areas of the Hospital which were off-limits to the public. After conferring with Hospital officials and after thoroughly reviewing the Employee Handbook, counsel advised the Hospital that the no-solicitation and no-distribution rules, which as a matter of past practice had

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[4] The Act was amended effective August 25, 1974, to extend its protection to employees of non-profit hospitals. Public Law 93-360, 93rd Congress, 2d Session, July 26, 1974, 88 Stat. 395.

[5] Vice President W. T. Victory's testimony that the "change" in the Hospital's no-solicitation rule was prompted by the Union organizational campaign (A. 6) should be read in this context. The Hospital does not deny that its awareness in mid-August, 1974, that there was a union organizational drive underway contributed to its decision to clarify the no-solicitation rule that was published in the Employee Handbook. It insists, however, that this clarification was undertaken in the context of a comprehensive review of its labor relations policies resulting from the Hospital's imminent inclusion under the Act. It also insists that the posting of the "new" rule on October 4, 1974, did not affect its long-standing no-solicitation policy. The posting of this rule only amended the formally promulgated rule in the Employee Handbook to conform with this long-standing policy.

been in effect for some time, should be *clarified* in writing and posted for the Hospital's employees to read (A. 21-24). As a result of these conferences with its legal counsel, the Hospital promulgated the following rule on October 4, 1974:

> "The solicitation and distribution policy of Baptist Hospital has been revised. This has been done to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital. The policy is as follows:
>
> "*No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action.* In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions, will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> "No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time." [Emphasis supplied] (A. 75; B. 4-5; Pet. App. 2a-3a)

The emphasized part of this no-solicitation/no-distribution rule is the portion which the Board contends and the Administrative Law Judge and Board held violates Section 8(a)(1) of the Act (B. 14-22; Pet. App. 16a, 22a, 63a, 76a, 89a). As found by the Board's Administrative Law Judge and as re-

flected in the Board's Brief to this Court, the Board does not allege to be unlawful the prohibition of solicitation during working time in work areas which are not accessible to or utilized by the public, or the prohibition against the distribution of literature of any kind in any working area at any time (Pet. App. 63a; B. 14-22).

In discussing the application of the disputed portion of this rule, the Hospital's Vice President for Personnel Services, W. T. Victory, explained that employees are prohibited from soliciting other employees for any purpose in any area of the Hospital which is open to the public (A. 8-20). He emphasized that patient care considerations were the primary concern motivating the Hospital to adopt this no-solicitation policy immunizing patients and their families from the often disturbing distractions associated with any form of solicitation (A. 5-6, 12). Two medical experts testified in support of the Hospital's rule emphasizing the medical importance of avoiding subjecting patients and their families to the potentially disturbing distraction of union solicitation (A. 38-46, 51-65). Mr. Victory also emphasized that this rule was applied equally to solicitation of any form, including car salesmen, collection agencies and insurance men, in addition to union organizers (A. 9). He noted in particular that the no-solicitation policy was equally applicable to the Hospital's management representatives in their efforts to encourage employees not to support the Union (A. 27-28).

Among the controversial "public access" areas of the Hospital where solicitation is prohibited under the rule are the gift shop, the main cafeteria (which is open to the public), the lobbies, public restrooms, entrances, and sidewalks leading to the entrances of the Hospital (Pet. App. 35a-36a; A. 8-11, 13-16). Solicitation is permitted in areas of the Hospital which are closed to the public and which are not being used as "work" areas. Such areas include some 26 nurse's stations lo-

cated throughout the Hospital,[6] an equal number of utility rooms similarly dispersed throughout the Hospital, the Hospital's maintenance building, the employees' lounge in the laundry building, and the employees' lounge on the fourth floor of the Hospital's main building (Pet. App. 36a-37a; A. 8-9, 16-19, 25-26).

The Board's Decision

In his decision issued August 26, 1975, the Board's Administrative Law Judge found and concluded *inter alia* that the Hospital had violated Section 8(a)(1) of the Act by promulgating and maintaining the aforementioned no-solicitation rule which prohibited employees from soliciting for the Union during their non-work time in non-work public areas of the Hospital. In so holding the Administrative Law Judge concluded that the "special circumstances" shown by the Hospital were insufficient to warrant a departure from the Board's general policy of finding violative no-solicitation rules on non-work time (Pet. App. 63a-76a, 89a).[7] The Board in its decision and order issued March 26, 1976, adopted the findings of the Administrative Law Judge that the no-solicitation rule in question

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[6] The decision of the Board's Administrative Law Judge contains a footnote which suggests confusion over the Hospital's allowing solicitation in the nurses' stations (Pet. App. 36a, fn. 3). Whatever confusion appears in the testimony of Mr. Victory the fact remains that, as written and enforced, the Hospital's no-solicitation rule clearly permits such solicitation. The rule proscribes solicitation in *"work areas"* by an employee who is *supposed to be working or in such a way as to interfere with the work of other employees who are supposed to be working."* Since nursing stations and utility rooms are not accessible to the public and are utilized by employees *during breaks* (A. 26), there is nothing inconsistent in permitting solicitation in these areas *during such break intervals.* This is precisely the Hospital's policy.

[7] In holding the no-solicitation rule invalid the Administrative Law Judge relied upon the Board's decision in *Summit Nursing Home, Inc.*, 196 NLRB 769 (1972), enforcement denied 472 F. 2d 1380 (6th Cir. 1973) (Pet. App. 6a-7a, 73a-74a).

violated Section 8(a)(1) of the Act for the reasons set forth in its decision in *St. John's Hospital & School of Nursing*, 222 NLRB 1150 (1976), enforced in part and denied in part, 557 F. 2d 1368 (10th Cir. 1977) (Pet. App. 16a, fn. 2, 22a). The Board's order required the Hospital to cease and desist from promulgating, maintaining in effect, enforcing or applying a rule or regulation "prohibiting its employees from soliciting on behalf of any labor organization during their non-work time in any area of its hospital other than immediate patient care areas." (Pet. App. 24a, 90a).

The Court of Appeals Decision

The Sixth Circuit Court denied enforcement of the Board's order as it pertained to the Hospital's no-solicitation rule (Pet. App. 13a-14a). The Court held that the Board was not warranted in finding the Hospital in violation of Section 8(a)(1) of the Act by promulgating and maintaining a rule which prohibits employees from soliciting for a union during their non-work time in areas of the Hospital other than "immediate patient care areas", including the gift shop, lobbies and main cafeteria that are open to employees, visitors and, with some exceptions, to patients. Circuit Judge Lively, writing for the court, discussed the uncontradicted medical testimony concerning the necessity for such a broad rule and he observed:

> "In ordering that the ban against solicitation by non-working employees in the present case be limited to areas of 'immediate patient care' the Board in effect held that the hospital had proven 'special circumstances' only in relation to those areas. The proof is otherwise. *Three witnesses emphasized the fact that many patients, though hospitalized for serious illnesses, are permitted to move freely through public areas of the hospital.* Ambulatory patients are permitted to visit with their families and friends in the lobbies and public lounges. They are free to visit the gift shop and, with a doctor's permission, to eat in the public cafeteria. *These witnesses, two physicians and an experienced hospital administrator, repeatedly referred to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors.* The testimony of the medical witnesses related this requirement directly to the well-being of the patients. *The witnesses made no distinction between areas of immediate patient care and other areas of the hospital.* Dr. Ricketson stated that patient care is the only purpose of the hospital, and anything which interferes with patient care should be forbidden." (Emphasis added) (Pet. App. 7a-8a).

The Sixth Circuit Court declined to follow the reasoning of the courts of appeals in *Lutheran Hospital of Milwaukee, Inc. v. NLRB*, 564 F. 2d 208 (7th Cir. 1977) and *NLRB v. Beth Israel Hospital*, 554 F. 2d 477 (1st Cir. 1977), prior decisions which enforced Board orders limiting a hospital's right to ban solicitation and distribution to "immediate patient care areas", and the court said:

> *"In the setting of a modern general hospital it is difficult to define the areas of immediate patient care.* One of the medical witnesses in the present case referred to the importance of the psychological attitudes of patients. *A patient's attitude toward the hospital and the likelihood of receiving expert care while there depends in part on whether he perceives the staff as concerned exclusively with patient care.* This need for professionalism was not limited by the witness to doctors and nurses, but was set forth as a requirement for all employees. *Both physican witnesses testified that any activity within the hospital involving volatile or hostile discussion of any subject whether observed by patients or related to them by visiting family or friends, would be detrimental to their well-being.* There is no evidence in this case to justify an immediate patient

care area limitation on the no-solicitation rule." (Emphasis added) (Pet. App. 8a).

Instead, the Sixth Circuit Court accepted the basic reasoning of the appellate courts in *St. John's Hospital and School of Nursing, Inc. v. NLRB*, 557 F. 2d 1368 (10th Cir. 1977) and *Baylor University Medical Center v. NLRB*, 578 F. 2d 351 (D. C. Cir. 1978) as correct (Pet. App. 8a-9a). The Court observed that the First Circuit in *NLRB v. Beth Israel Hospital, supra*, held that the hospital failed to sustain its burden of showing that special circumstances justified a ban on employee solicitations in a cafeteria and coffee shop; whereas, in the instant case the record ". . . contains uncontradicted testimony that these areas are part of the total environment of the hospital where the medical needs of patients are served by maintaining a climate free of strife and controversy." (Pet. App. 10a). Finally, the Court noted that there are numerous locations, including employees' lounges, utility rooms, nurses' stations, rest rooms and parking lot, which are open to solicitation, thus providing Hospital employees with the opportunity to exercise their rights under Section 7 of the Act (Pet. App. 10a-11a).

SUMMARY OF ARGUMENT

In *Beth Israel Hospital v. NLRB*, 437 U. S. 483 (1978), 98 S. Ct. 2463, 57 L. Ed. 2d 270, the Court held that union solicitation of employees by other employees could not be prohibited by a hospital in its public cafeteria and coffee shop during non-working time unless the hospital was able to show that the prohibition of such activity is necessary to avoid disrupting health care operations or disturbing hospital patients. However, this decision was limited to the particular record before the Court in *Beth Israel* and did not establish a hard and fast rule to be applied in all future hospital no-solicitaton rule cases.

It is submitted that there are a number of factual differences that distinguish the instant case from *Beth Israel*. For example, contrary to *Beth Israel* where the hospital offered no affirmative evidence to establish the necessity for its broad no-solicitation rule, the record in the present case contains uncontradicted expert medical testimony that the rule is necessary in patient-access areas at Baptist Hospital in order to shield patients and their visitors from the potentially disturbing effects of various forms of solicitation. Baptist Hospital has a responsibility to create an atmosphere for its patients free of potential strife and controversy, and this goal clearly can not be accomplished if employees are free to solicit in those areas of the hospital which are accessible to ambulatory patients and their visitors (e.g. public cafeteria, lounges, corridors, elevators, etc.). This uncontradicted medical testimony establishes the necessity for a broad no-solicitation rule in the patient-access areas of the Hospital as the Circuit Court correctly concluded.

Another significant difference distinguishing this case from *Beth Israel* is the uncontradicted fact that patients and their visitors constitute about 32 percent of the cafeteria's patrons on weekdays and about 53 percent on weekends, which is considerably higher than the non-employee usage statistics shown in the record in *Beth Israel* that the Court deemed to be of "critical significance" 57 L. Ed. 2d at 386. This would indicate that the Baptist Hospital cafeteria is a more typical patient-relative oriented cafeteria than the one at *Beth Israel*, which has been likened to an industrial plant's employees cafeteria, 57 L. Ed. 2d at 391. Therefore, the potential for patient and visitor exposure to the disquieting effects of solicitation in the Baptist Hospital cafeteria is much greater.

In *Beth Israel* the Court noted that there were "relatively few places" where employees could meet on hospital premises for the purpose of discussing unions or other matters besides the hospital cafeteria. 57 L. Ed. 2d at 379. Such is not the

case at Baptist Hospital as the record clearly reflects. The Sixth Circuit Court expressly found that Baptist Hospital has a "large number of areas which are closed to patients and the public where the no-solicitation rule does not apply." (Pet. App. 10a). The Board ignored these alternative channels for employee communications in reaching its decision that the Hospital's no-solicitation rule is invalid *per se*.

Moreover, unlike *Beth Israel*, there is no evidence in the record in this case that the Hospital has permitted the use of its cafeteria for other types of solicitation, including fund drives, or that the Hospital has adopted a less restrictive approach to behavior in the cafeteria which would be at least as disquieting to patients as union solicitation. On the contrary, the record evidence shows that the Hospital has consistently enforced its no-solicitation policy by preventing other forms of solicitation in its cafeteria (e.g., Avon saleswoman and car saleswoman), and has not allowed its management staff to engage in anti-union conversations with employees in this or other patient-access areas.

It is submitted that the Hospital has shown special circumstances in this case that justifies the promulgation and maintenance of a no-solicitation rule prohibiting its employees from soliciting other employees during non-work times in those areas of the hospital that are accessible to patients and their visitors. Accordingly, the Sixth Circuit Court was correct in concluding that substantial evidence in the record failed to support the Board's finding that the Hospital violated Section 8(a)(1) of the Act.

ARGUMENT

The Hospital Has Shown Special Circumstances That Justify Its Broad No-Solicitation Rule Prohibiting Employees From Soliciting Other Employees During Non-Work Times in Non-Work Areas Which Are Accessible to Patients and Their Visitors.

The Board argues in its Brief that the decision of the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U. S. 483 (1978), 98 S.Ct. 2463, 57 L. Ed. 2d 370, resolves all the issues raised in the instant matter and that said decision is fully applicable and controlling herein (B. 12-22). We submit that such is not the case since there are several significant differences that clearly distinguish this case from *Beth Israel*.

Generally, in *Beth Israel* the Court ruled that union solicitation could not be prohibited by a hospital during non-working time in non-working areas which are accessible to patients and the public as well as employees (i.e., cafeteria and coffee shop) unless the hospital shows that the prohibition of such activity is necessary to avoid disrupting health care operations or disturbing patients. In accordance with *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Court majority held that the burden was on the hospital to show that special circumstances justified banning solicitation in the cafeteria since it was a "natural gathering place for employees."[8] In his opinion for the Court in *Beth Israel* Mr. Justice Brennan carefully emphasized, however, that the Court was limiting its decision to the

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[8] Unlike *Beth Israel*, however, where only that portion of the hospital's no-solicitation rule prohibiting employees from soliciting other employees even during non-working time *in the hospital's eating facilities* was before the Court, in the instant case Baptist Hospital's full no-solicitation rule banning employees from soliciting other employees in *any* area of the hospital which is accessible to patients or their visitors including such areas as corridors, elevators, lobbies, gift shop, as well as public cafeteria, etc. is squarely before the Court.

particular record before it and that it was in no way sanctioning perfunctorily an *a priori* analysis by the Board in other hospital no-solicitation rule cases. The Court's opinion concludes:

> "We therefore hold that the Board's general approach requiring health-care facilities to permit employee solicitation and distribution during non-working time in non-working areas, *where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients,* is consistent with the Act. We hold further that, with respect to the application of that principle to petitioner's cafeteria, the Board was appropriately sensitive to the importance of petitioner's interest in maintaining a tranquil environment for patients . . . The Court of Appeals did note, however, that the Board's guidelines are still in flux and are far from self-defining, concluding and *we agree, that*:
>
> > 'the Board [bears] a heavy continuing responsibility to review its policies concerning organizational activity in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial setting with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.' " (Emphasis added)
>
> 57 L. Ed. 2d at 389-390.

The concurring opinions of Mr. Justice Blackmun (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) and Mr. Justice Powell (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) also clearly emphasize the narrowness of the Court's holding as based upon unique circumstances at ***Beth Israel Hospital,*** 57 L. Ed. 2d 390-396. Sounding a note of caution Mr. Justice Blackmun said in his concurring opinion:

> The tenor of the Court's opinion and of the Board's approach concerns me. *There are many hospital coffeeshops and cafeterias that are primarily patient and patient-relative oriented, despite the presence of employee-patrons, far more so than this very restricted Beth Israel operation, that seems akin to a manufacturing plant's employees cafeteria.* I fear that this unusual case will be deemed to be an example for all hospital eating-facility cases, and that the Board and the courts now will go further down the open-solicitation road than they would have done, had a more usual hospital case been the one first to come here. *Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented —need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.*
>
> I entertain distinct doubts about whether the Board, in its preoccupation with labor-management problems, has properly sensed and appreciated the true hospital operation and its atmosphere and the institution's purpose and needs. I earnestly share the caveat pronounced by the Court of Appeals, and reproduced by the Court in the next to the last paragraph of its opinion, ante, pp. . . ., and I sincerely hope that the Board bears that heavy responsibility in mind when it considers other hospital cases that come before it for decision. (Emphasis added)
>
> 57 L. Ed. 2d at 390-391

The function of the Board, according to the majority opinion in ***Beth Israel,*** is to balance conflicting legitimate interests to

effectuate fundamental national labor policy, 57 L. Ed. 2d 385-386. In cases that affect the health care industry the conflicting interests are, on the one hand, the hospital's desire to protect its patients from disturbance and, on the other, the union's desire to organize the hospital's employees. As noted by Mr. Justice Brennan "it may be [in the health care field] that the importance of the employer's interest here demands use of a more finely calibrated scale." 57 L. Ed. 2d at 388. The Board itself has concluded that the special characteristics of hospitals justify a rule different from that which the Board generally applies to other employers. *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), enforced in part and denied in part, 557 F. 2d 1368 (10th Cir. 1977).[9] Nevertheless, despite earlier views to the contrary, [10] the Board has in *St. John's* and subsequent cases concluded that the balance should be struck against hospital bans on employee

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[9] The Board said in *St. John's* at 1150:

> *"We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of the function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted.* For example, a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind." (Emphasis added)

[10] In *Guyan Valley Hospital*, 198 NLRB 107 (1972), the Board said at 111:

> [I]t must be remembered that Respondents facility is not a manufacturing plant, it is a hospital. And it is in the nature of hospitals that certain of the working areas (hallways, elevators, stairs, patient's rooms, gift shops, etc.) are necessarily open to the use of the patients and visitors . . . Further, the hospital services ill individuals who, in their weakened condition may readily be upset if they overhear anti-union/pro-union arguments . . .

solicitations during non-work times in areas other than "immediate patient care areas", such as lounges and cafeterias, absent a showing that disruption would necessarily result if solicitation was permitted in these areas.[11] The Board has consistently defined "immediate patient care areas", where solicitation may be prohibited, as "patients' rooms, operating rooms and places where patients receive treatment such as X-ray and therapy areas." All other areas accessible to patients and their visitors, according to the Board's present policy, are open to unrestricted employee solicitation during non-work time since the "possibility of any disruption in patient care resulting from solicitation or distribution of literature is remote." 222 NLRB at 1151. However, it is submitted that in the instant case the Board has failed to strike the proper balance between conflicting legitimate interests since, unlike an industrial setting, it is not the non-profit hospital but rather its patients whose interests are in conflict with those of the hospital employees. See *Baylor University Medical Center v. NLRB*, 578 F. 2d 351, 354, fn. 23 (D.C. Cir. 1978), affirmed in part and remanded in part, — U.S. — (1978), 58 L. Ed. 2d 202.

On the basis of the record before the Board in *Beth Israel* the Supreme Court held that the Board had correctly evaluated the relative strengths of the competing interests and considered all factors appropriately to be taken into account. However, the record in *Beth Israel* differs in several material respects from the record before the Board in the case *sub judice*.

For example, among the significant differences distinguishing this case from *Beth Israel* is the fact that the main cafeteria in Baptist Hospital is a far more typical "public" cafeteria rou-

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[11] See, e.g. *St. Peter's Medical Center*, 223 NLRB 1022 (1976); *Beth Israel Hospital*, 223 NLRB 1193 (1976); *Lutheran Hospital of Milwaukee*, 224 NLRB 176 (1976); *Baylor University Medical Center*, 225 NLRB 771 (1976); *St. Joseph Hospital*, 228 NLRB 158 (1977).

tinely utilized by employees, patients and their visitors alike. Moreover, unlike *Beth Israel* there is no evidence in the instant record suggesting that as few as 1.56 percent of the cafeteria's patrons are patients while only an additional 9 percent are visitors. These statistics were characterized as being of "critical significance" by Mr. Justice Brennan in the majority opinion for the Court in *Beth Israel,* 57 L. Ed. 2d at 386. On the contrary, Vice President Victory testified that the Hospital did a study at its counsel's request to determine the percentage of non-employees that used the main cafeteria, and this study showed that on a weekday about 32 percent of the people using the cafeteria during meal periods were non-employees and that on a week-end about 53 percent were non-employees (A. 27, 36-38). Thus, it is apparent that there is substantially greater usage of the main cafeteria by patients and visitors at Baptist Hospital than was shown in the record before the Board in *Beth Israel.*[12] Moreover, the expert medical testimony that was introduced in this case emphasized the Hospital's policy of encouraging controlled mobility among patients at the hospital thereby suggesting a greatly different pattern of cafeteria utilization at Baptist Hospital than existed in *Beth Israel* (A. 54-56, 63-65).

Further distinguishing the cafeteria situation at Baptist Hospital is the fact that there is no comparable evidence in the instant case suggesting that the Hospital's cafeteria constitutes

[12] In its Brief the Board valiantly attempts to downplay the significance of the study figures showing substantial patient and visitor usage of the main cafeteria at Baptist Hospital by arguing that the study was based on a count of employees wearing identification pins who went through the serving lines during meal periods and, further, that the study would not have included employees who brought their own lunches, used the vending machines, or made no purchases (B. 7, fn. 7, 15, fn. 15). However, the Board ignores the fact that the percentage of employees going through the cafeteria serving lines during meal periods is undoubtedly *higher* than at other times since employees wearing their identification pins are entitled to a 25 percent discount on all purchases made (A.26).

the "natural gathering place" for the Hospital's employees during their non-work time. Indeed, unlike *Beth Israel* where the Court accepted the Administrative Law Judge's finding that there were "relatively few places where employees could congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters other than the cafeteria" (57 L. Ed. 2d at 379), the Sixth Circuit expressly found that Baptist Hospital still has a "large number of areas which are closed to patients and the public where the no-solicitation rule does not apply" (Pet. App. 10a). Those areas include several employee lounges which contain vending machines, 28 utility rooms, 26 nurses' stations and those rest rooms which are restricted to employee use only (Pet. App. 3a; A. 8-9, 16-19, 25-26). Clearly, the employees have ample opportunity to discuss possible union organization in these other areas of the hospital, and the Sixth Circuit Court aptly noted that there was uncontradicted testimony in the instant record indicating that employees have openly solicited for a union in these areas without interference by the Hospital (Pet App. 3a-4a; A. 26).[13] Significantly, the Board in its determination that the Hospital's no-solicitation rule is invalid did not even consider these other areas where employees could solicit and organize during non-work time, even though this Court has sug-

[13] In its Brief the Board argues that these other areas of the hospital are *not adequate* for the effective exercise of the employees' organizational rights in that the lounge in the laundry building is not easily accessible to most of the 1800 employees, whereas the other lounge or dining area located on the fourth floor of the central building is too small and is used primarily by surgical personnel. With regard to the numerous nurses' stations and utility rooms available, the Board contends that relatively few employees take their breaks in these areas and bases this conclusion on the testimony of two out of 1800 employees (B. 21). Actually, the Board is assuming facts not in the record since there is no evidence that the majority of the Hospital's employees go to the main cafeteria during their relief periods rather than utilize these lounges, utility rooms, etc. located throughout the hospital. In addition, the Board's argument ignores the fact that solicitation and distribution are permitted in the adjacent parking lot so long as it does not "create a nuisance" to others (Pet. App. 10a-11a).

gested that the Board should consider whether a union and its supporters have available alternative channels for communications to employees *NLRB v. United Steelworkers of America*, 357 U.S. 357, 364 (1958).

Additional factors distinguish the record in the instant case. In *Beth Israel* the Court emphasized how the hospital had ignored its asserted fears and utilized its cafeteria for other types of solicitation unrelated to unionization. Mr. Justice Brennan noted:

> "Petitioner has itself recognized that the cafeteria is a natural gathering place for employees on non-working time, for it has used and permitted use of the cafeteria for solicitation and distribution to employees for purposes other than union activity. For example, *petitioner maintains an official bulletin board in the cafeteria for communicating certain messages to employees.* On occasion it has set up special tables in or near the cafeteria entrance to aid solicitation of contributions for the United Way or United Fund charities, the Jewish Philanthropies Organization Drive, the Israel Emergency Fund, and to recruit members for the credit union. When petitioner embarked upon an intensive cost reduction program, styled "Save a Buck a Day" or "BAD", it used the cafeteria to post banners and distribute informational literature touting the program to employees, and significantly, generally did not use the locker and rest rooms for this purpose. *In addition to these official uses, petitioner maintains an unofficial bulletin board in the cafeteria for the employees' use, a rack and small table which display commercial literature, such as travel brochures, and information of interest only to employees, such as car-pool openings.*" (Emphasis added)
>
> 57 L. Ed. at 379

There is no such showing in the instant record. Similarly, in *Beth Israel* the Court noted evidence indicating that the

hospital had at one time "permitted limited union solicitation in the cafeteria without untoward effects" 57 L. Ed. 2d at 386. In the case *sub judice* the record includes uncontradicted testimony by one of the Board's own witnesses (French) acknowledging that his union solicitation had already resulted in untoward incidents involving open expressions of hostility between employees for and against a union (A. 66-68).[14]

The Court in *Beth Israel* also noted that there was "cogent" evidence indicating that the hospital had previously confined its concern that patients might overhear employee cafeteria conversations that could be potentially disquieting to simply cautioning its staff to "restrict the voicing of your clinical discussion to include none other than your intended audience." 57 L. Ed. 2d 386-387, fn. 20. In the instant case the record not only fails to include any similar showing but the evidence is undisputed that Baptist Hospital further substantiated the sincerity of its concern that patients might be exposed to the disconcerting themes of union solicitation by also prohibiting its management staff from engaging in anti-union conversations in these same areas where they might be overheard by patients or their visitors (A. 27-28).

Finally, and perhaps most significantly, contrary to *Beth Israel* where the hospital offered no affirmative evidence to substantiate the necessity for its no solicitation rule, the record in the instant case includes highly pertinent and wholly uncontradicted expert testimony supporting the medical necessity for the no-solicitation rule at Baptist Hospital (A. 39-43, 52-60). As summarized in the Sixth Circuit Court's decision:

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[14] The Board deems these two incidents as insignificant since neither resulted in any type of "disturbance" (B. 18, fn. 19). It is submitted, however, that the lack of a disturbance during these cafeteria incidents should not be controlling since it is the *content* of the overheard conversations that would tend to be disquieting to patients or visitors and not necessarily the noise level of the conversations.

"Two members of the medical staff of the hospital testified. Both were experienced physicians and engaged in private practice. Dr. Russell T. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have 'a great deal to do with the recovery' of the patient. The witness stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital. If the union activity should become 'volatile or hostile in any form' it was Dr. Birmingham's opinion that such activity would have a potential for affecting patients and their families adversely.

Dr. Greer Ricketson testified that any 'non professional attitude' among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. The witness, who was chief of the medical staff of the hospital at the time of the hearing, stated emphatically that the rule and the reasons for the rule apply equally to all solicitations. Explaining the need for a rule which covers the entire working and public access areas of the hospital, Dr. Ricketson referred to the present-day mobility of patients and the fact that an event which disturbs the visiting family invariably gets back to the patient.

No evidence was introduced which contradicted in any way the testimony of the two doctors that important medical reasons exist for maintaining the no-solicitation rule of the hospital." (Emphasis added) (Pet. App. 4a-5a)

Therefore, even accepting the Board's premise in the instant case that the Supreme Court's decision in *Beth Israel* requires a hospital to justify a no-solicitation rule extending beyond "immediate patient care areas" of the hospital, this totally

unrefuted expert medical testimony establishing the necessity for such a rule, which is not found in the record in *Beth Israel*, clearly satisfies this burden in the instant case.

In this and similar cases involving hospital no-solicitation rules the Board takes little notice of the fact that a hospital has a responsibility to create an atmosphere free of potential disruption and trauma. Surely, patients that are diseased, weak and, in some cases, emotionally upset have rights which are paramount in any consideration of a hospital no-solicitation rule's validity. It seems inconceivable that such patient rights should be considered inferior to those of retail store or restaurant customers. Mr. Justice Powell in his concurring opinion in *Beth Israel* stated:

> "In my view, the presence of patients and members of the public in the hospital cafeteria removes the case from the framework established in Republic Aviation, just as the presence of customers has that effect in the Board's retail establishment cases. *The hospital's function in serving patients, their families, and visitors is much like the retail establishment's function in serving its customers. That a nonprofit hospital does not share the profit motive of a retail establishment does not diminish the hospital employer's professional concern for the welfare of those in its care, including not only patients but also their friends and relatives who come to visit.*
>
> It is true that the hospital's primary function is carried out in the immediate patient care areas, just as the retail establishment's main function is carried out on the selling floor. But the Board has applied its retail store rules to public restaurants on the premises of the retail store, see ante, p. . . ., 57 L. Ed. 2d 393, notwithstanding the fact that the primary selling function does not take place there. Public restaurants in retail stores are provided for some of the reasons that hospitals maintain public eating places—

including the convenience of the establishment's patrons. In addition, *a hospital's more general purpose extends to, and pervades, all areas of the hospital to which the public has access; it is not limited narrowly to the provision of technical medical treatment.* Part of the hospital's function is to provide a 'total environment . . . where the medical needs of patients are served by maintaining a climate free of strife and controversy." NLRB v. Baptist Hospital, Inc., 576 F. 2d 107, 110 (CA6, 1978). *In this respect, the Board should take greater account of the impact of solicitation in this sensitive area than it does with respect to retail establishments.* A presumption developed in and geared to the context of industrial establishments, which the Board has declined to apply to retail stores, simply has no relevance to hospitals." (Emphasis added)

47 L. Ed. 2d at 393-394

The Circuit Court Properly Concluded That Substantial Evidence in the Record Failed to Support the Board's Conclusion That the Hospital Had Not Justified the Need for a Broad No-Solicitation Rule.

Baptist Hospital is not an industrial plant. It is a hospital—and its hallways, elevators, cafeteria, stairs, lobbies and gift shop are necessarily open to the use of patients and visitors.[15] To fully appreciate the trauma that is experienced in this or any general hospital on a daily basis, one must, perhaps, experience the misfortune of taking a loved one to an emergency room in very serious condition. One who has done so can fully understand the fear and anxiety that all patients and

[15] In *St. John's Hospital & School of Nursing v. NLRB*, 557 F. 2d 1368, 1375 (10th Cir. 1977), the court held that the Board's definition of "strictly patient care areas" must be interpreted to include such areas as halls, stairways, elevators and waiting rooms accessible to patients.

families are subjected to during a medical crisis. Both the families and the patients are "on pins and needles" as Dr. Ricketson accurately described (A. 53). Vice President Victory also testified as to the emotional strain that is prevalent among patients and their families and emphasized the fact that the Hospital's Employee Handbook makes numerous references to the need to avoid conduct that might tend to be disturbing to patients (A. 23). (See also discussion, *supra*, pp. 3-5). Two experienced physicians testified in this case that union solicitation in the presence of patients or visitors could very well have a harmful effect on their physical well-being. "A hospital need not wait until an untoward incident actually takes place before undertaking reasonable measures to anticipate or forestall such an occurrence." *Guyan Valley Hospital*, 198 NLRB 107, 111 (1972).

The aforementioned solicitation incidents involving Clyde Russell French, which created a "hostile" and potentially volative employee reaction in the cafeteria, could just as well have happened in one of the lobbies, an elevator, the gift shop or a hospital corridor in the presence of patients and/or members of their families. Certainly, the average person would not want to admit or keep a seriously ill loved one in a hospital that allowed such unsettling conduct to take place in those areas accessible to patients and the public. As the District of Columbia Circuit correctly noted in *Baylor University Medical Center v. NLRB*, 578 F. 2d 351 (D.C. Cir. 1978),[16] at 356:

> "Furthermore, solicitation has a disruptive force quite apart from its contribution to noise level and overcrowd-

[16] This Court in *NLRB v. Baylor University Medical Center*, — U.S. — (1978), 58 L. Ed. 2d 202, denied the Board's petition for certiorari as it sought review of the corridor issue, but remanded the case to the circuit court to reconsider the cafeteria issue in light of this Court's subsequent holding in *Beth Israel*. The Circuit Court has since remanded the case to the Board for further proceedings, — F. 2d — (D. C. Cir., January 22, 1979), 100 LRRM 2340.

ing. *There was evidence at the hearing that witnessing solicitation tends to undermine both patients' and visitors' confidence in the hospital. Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable additional source of anxiety for persons already hard-taxed emotionally.* And the thought that matters affecting one's life and death are perceived in terms of wage increases and coffee breaks by those responsible for one's well-being fully justifies the very upsetting concern that patients and those close to them were shown to have about such activities. *It is not only the likelihood that congestion and commotion would result from such solicitation, but also the inherently disturbing effect of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging assistance of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule.*" (Emphasis added)

This apprehension by patients and family members about the quality of medical care available at the hospital would, we submit, be compounded many times should such persons overhear employees discussing possible strikes, slowdowns or other work stoppages in order to obtain economic concession from the hospital. Even the most arden union supporter wants and demands the undivided attention and care of hospital personnel when he is experiencing the emotional stress that accompanies his own physical pain or discomfort, or that of an ill or injured loved one. As testified by the two medical experts in this case, any indication of indifference or lack of concern on the part of hospital personnel can deleteriously affect the psychological or physical state of both the patient and his family. Clearly,

the Board failed to consider and accord weight to all the relevant factors which are involved in the operation of Baptist Hospital in attempting to strike an acceptable balance between the right of self-organization assured to employees under the Act and the equally undisputed right of the Hospital to operate efficiently and to serve the needs of its patients.

Considering the nature and purpose of the institution, as well as the overriding necessity for protecting the physical and emotional well-being of its patients, any presumption of illegality in the Hospital's broad no-solicitation rule has been overcome by the "special circumstances" shown in the record in this case. The record evidence clearly demonstrates that a hospital environment is a unique and special situation in which a broad no-solicitation/no-distribution ban in "patient access areas" is necessary to avoid disrupting health care operations or disturbing patients. The Hospital respectfully submits that the Sixth Circuit Court gave proper consideration to the identical factors found relevant in *Beth Israel* and on the record before it properly concluded that substantial evidence failed to support the Board's conclusion that Baptist Hospital had not justified its no-solicitation rule. Quoting once more from Mr. Justice Brennan's opinion for the Court in *Beth Israel*:

"Insofar as petitioner's challenge is to the substantiality of the evidence supporting the Board's conclusions, this Court's review is of course limited.

'Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied.' *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)." (Emphasis added)

57 L. Ed. 2d at 390

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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